2008

Developments in Connecticut Criminal Law: 2007

Timothy Everett
University of Connecticut School of Law

DEVELOPMENTS IN CONNECTICUT CRIMINAL LAW: 2007

BY TIMOTHY H. EVERETT*

This article reviews some issues of procedural and substantive criminal law that arose in appellate cases decided by the Connecticut Supreme and Appellate Courts in 2007. In 2007 the Connecticut Supreme Court decided a total of 47 criminal appeals, the vast majority of which were direct appeals from judgment after criminal trials, with just a few cases involving collateral review and other post-judgment issues such as habeas corpus petitions, motions to correct an illegal sentence, and new trial petitions. The Supreme Court issued 36 full opinions and 11 *per curiam* opinions. The court sat *en banc* seven times.[1] One of the *en banc* cases, *State v. Lawrence*,[2] generated the year's sole dissent and also one of the year's two concurring opinions.[3] The Supreme Court docket comprised 12 cases brought directly to the court, 10 cases transferred from the Appellate Court[4] and 25 cases in

---

* Clinical Professor of Law, University of Connecticut School of Law.

1 State v. Lawrence, 282 Conn. 141 (2007) (6-1 holding that state constitutional standard for proof of voluntariness of a confession is same as federal preponderance standard); State v. Casiano, 282 Conn. 614, 627-28 (2007) (indigent has right to appointment of counsel for filing and appeal of a motion to correct sentence that has a "sound basis"); State v. Saucier, 283 Conn. 207, 217-18 (2007) (affirmed Appellate Court review of claim regarding state of mind exception to hearsay rule; clarified standard of review on appeal of hearsay rulings, adopting neither abuse of discretion nor de novo review, preferring a "more nuanced," context-sensitive approach "driven by the specific nature of the claim"); State v. Davis, 283 Conn. 280 (2007) (rejected state constitutional argument for adopting pre-1980 federal "automatic standing" test for challenges to police searches); State v. Brewer, 283 Conn. 352, 360-61 (2007) (no clear violation of the Constitution where trial court gave Connecticut's "acquittal first" jury charge relating to lesser included offenses as requested by trial counsel, who "expressed his satisfaction with that instruction"); State v. Randolph, 284 Conn. 328 (2007) (consolidated trial at which trial judge court erroneously instructed jury it could consider evidence from each case in the other; common scheme or plan exception analyzed); State v. Britton, 283 Conn. 598 (2007) (custody not established to trigger *Miranda* protections; *Golding* review denied to claim that court should not have read charge on aggravating factor for capital charge to jurors during voir dire).

2 2282 Conn. 141 (2007).

3 Justice Palmer joined the majority opinion in *Lawrence* but wrote a brief concurrence. *Id.* at 184-85. Justice Katz dissented at length. *Id.* at 185-209.

4 Most of the transfers were initiated by the Supreme Court itself pursuant to CONN. GEN. STAT. § 51-199(c) and PRACTICE BOOK § 65-1, but one case was transferred at the request of the Appellate Court after oral argument in that court; Mead

court certified issues for appeal following decision
ellate Court. In the certified appeals, the Supreme
med the Appellate Court decisions 19 times and
x times.

the Appellate Court decided 129 direct appeals in
ses and another 53 appeals of claims made for col-
ef stemming from criminal cases (primarily peti-
rits of habeas corpus). Altogether there were 13
opinions and seven concurring (or partially con-
inions. The Appellate Court sat *en banc* only once,
Flanagan.[5] In *Flanagan*, the court granted the
s motion for reconsideration and reargument fol-
irst, split decision by a regular three-judge panel
he judgment.[6] In its *en banc* review, the court again
his time in a decision, split 5-4, rejecting the
s claim that the trial court had violated his consti-
ght of self-representation.[7] Chief Judge Flynn and
ers (joined by Judges DiPentima and McLaughlin)
nted, with Flynn's opinion commencing with the
ing topic sentence of the season: "We are heirs of
ut colonists who distrusted lawyers because so
the profession were aligned with King George."[8]

---

er, 282 Conn. 317, 318 n.1, 322 (2007); and one case was transferred
ne defendant; State v. Batts, 281 Conn. 682, 688 n.5 (2007). PRACTICE
governs transfers by motion of a party *before* oral argument in the
rt and upon the Appellate Court's own filing "*at any time* before the
ation of an appeal" of a "statement of the reasons why transfer is
which the Supreme Court will "treat" and "promptly decide" as if it
to transfer.

onn. App. 105 (2007), *cert. granted* (in part), 284 Conn. 922 (2007).
sue now before the Supreme Court is: "Did the Appellate Court prop-
that the trial court did not violate the defendant's right to self-repre-

usly, a split (2-1) regular panel of the court had reached the same
dge Dranginis (joined by Judge Bishop) authoring the majority opin-
ch Chief Judge Flynn dissented as to the self-representation issue.
gan, 93 Conn. App. 458 (2006). The *en banc* panel reconsidered only
entation issue decided by the first panel, and its decision superseded
ion on that issue alone. *Flanagan*, 102 Conn. App. at 107 n.2.

ngly, the Supreme Court has granted certification
e split decision of the *en banc* court in *Flanagan*.[9]

cle attends to some of the more important appel-
ecided in 2007 and also calls attention to cases
sues of continuing currency in criminal practice.
f the "cutting edge" criminal law issues from past
in so. For example, the Connecticut Supreme
et to settle the issue left open in *State v. Sawyer*,[10]
er the adoption of the Connecticut Code of
2000 removed or left intact the court's common-
ty to change rules of evidence.[11] Connecticut
nue to grapple with novel applications of con-
clause doctrine based on the United States
ourt's paradigm-shifting decision in *Crawford v.*
[12] in 2004.[13] The state Supreme Court in *State v.*
ied the paradigmatic principles set forth in
New Jersey[15] and held that the defendant had a
dment right to have a jury decide the statutory
mandate an enhanced sentence for a persistent
ny offender.[16]

l review of criminal appellate practice in 2007

---

ified issue is: "Did the Appellate Court properly conclude that the
ot violate the defendant's right to self-representation?" *Flanagan*,
2007).

nn. 331, n.1 (2006). The issue may be resolved when the court
fied issue in State v. DeJesus, 91 Conn. App. 47 (2005), *cert. grant-*
12 (2006) ("'Does this court, or any court, have the authority in light
ut Code of Evidence, to reconsider the rule that the introduction of
conduct of the defendant in sexual assault cases, is viewed under a
?'").

section, "Setting the Bounds for Evidentiary Review under the
awyer," in last year's annual review. T.H. Everett, *Developments in*
minal Law: 2006, 81 CONN. B. J. 161, 171-75 (2007).

. 36 (2004).

State v. Camacho, 282 Conn. 328 (2007); State v. Stenner, 281 Conn.
e v. Ramirez, 101 Conn. App. 283, 287-94 (2007) (*Crawford* error but
a reasonable doubt), *cert. denied*, 283 Conn. 909 (2007), *cert. denied*,
2008); State v. Torelli, 103 Conn. App. 646, 657-58 (2007).

ncomplete without mention of personnel changes reme Court. Appellate Court Judge Chase Rogers in as Chief Justice of the Supreme Court, Justice den reached the age of mandatory retirement from me Court, and Appellate Court Judge Barry vas appointed to the Supreme Court. Justice etirement bears special recognition. Justice Borden a justice on the Supreme Court from 1990 until prior to that served as an original member of the Court from the time it was constituted as a consti- urt in 1983. In his last year on the Supreme Court, rden continued his career-long drive to clarify legal ften doctrine articulated with less than ideal preci- evious cases.[17] Borden's intellectually keen pres- een a "given" on the appellate scene in Connecticut that the vast majority of criminal lawyers have no that pre-dates his elevation from the Superior some of us are surprised to find no textual support umption that the Constitution requires his presence ving court.[18] Thankfully, like other retired justices preme Court, Borden now sits on panels of the Court deciding cases and clarifying legal doctrine ropriate.[19]

---

appellate judge over the last quarter century, Borden has relentlessly iculation of a more consistent, functional, and reasonable body of doctrine, by disentangling inconsistencies in received doctrine and by formal nature of a given legal rule, often aided by a functional analy- erlying purpose of the rule. For example, in State v. Randolph, 284 3-68 (2007), Justice Borden writing for the court seized "this oppor- ze carefully our jurisprudence concerning the admissibility of evi- arged misconduct offered to establish the existence of a common in nonsex crime cases, and to clarify the principles that govern our 342. *Randolph* typifies the depth of analysis for which Borden is tingly, even in this particular subset of evidentiary law, Borden has a ing for the factors that most accurately reflect the proper and improp- arged misconduct evidence in a criminal case. *See* State v. Mooney, 125-32 (1991); State Morrell, 7 Conn. App. 75 (1986).

the text of the state constitution does not mention him by name, it is

I. POLICE INVESTIGATIONS: ESSIONS AND SEARCH AND SEIZURE DOCTRINE

ng courts in 2007 decided confessions cases ue process, *Miranda*, and right to counsel con- police interrogation of criminal suspects and . In the leading due process case, *State v.*) the Supreme Court rejected the defendant's hat his confession to ownership of cocaine seized ce during a search of his home was coerced from olice threat to have the Department of Children s remove his children and grandchildren from his s he confessed.[21] Justice Borden wrote the opin- court, rejecting the defendant's argument that his was inadmissible under the federal constitution ng the trial court's conclusion that the state had a preponderance of evidence that the defendant oluntarily despite the defendant's insistence in his at the suppression hearing that the police had him.[22] On appeal the defendant's second constitu- nent was that the court should overrule its decade- , in *State v. James*,[23] in which the court had held e constitutional standard for establishing the vol- of confessions is the same as the federal prepon- ndard.[24] The court rejected the defendant's invita- rule *James* and to adopt a state constitutional rule

---

of the court, written by him, in which the court overstepped those *ot think that this court should . . . be in the business of drafting spe- s for trial courts. We do our appellate job better by doing what we amely, reviewing instructions given by trial courts in the context of nd deciding whether they meet the specific legal challenge present- . . .* In this connection, I acknowledge that this court, in an opinion for the court, did draft specific instruction language in *State v.* Conn. 534, 579-80, 881 A.2d 290 (2005), *cert. denied,* 547 U.S. 1798, 164 L. Ed. 2d 537 (2005). In hindsight, I think that this was s proven to be so by the fact that, immediately upon the release of

have required the government to prove voluntari-
nd a reasonable doubt.[25]

Katz dissented in *Lawrence* on the state constitu-
ıe,[26] declaring that the *stare decisis* strength of
ld not withstand the "'lessons of experience'"[27] to
from numerous instances of exoneration of per-
NA evidence and by other means, many of which
outable to false confessions and police coercion.[28]
ed out that the underlying concern in modern fed-
itutional voluntariness doctrine is to determine
confession was coerced, but that the singular con-
coercion represents a narrowing of purpose from
ederal doctrine which also represented "the notion
urpose of a voluntariness hearing was to enhance
lity of jury verdicts."[29] In a brief concurrence in
joined the majority opinion, Justice Palmer
trong reasons why the legislature would be well-
change the law governing police interrogation in
ut, especially when a suspect is young or suffers
ntal disability:

eparately wrote only to underscore that, to the extent
e confessions have led to a number of wrongful con-

158-77.
185-209.
187 (quoting from Justice Brandeis's dissent in Burnet v. Coronado
., 285 U.S. 393, 406-10 (1932), part of which declares, "[I]n cases
Federal Constitution, where correction through legislative action is
possible, this Court has often overruled its earlier decisions. The Court
ssons of experience and the force of better reasoning, recognizing that
trial and error, so fruitful in the physical sciences, is appropriate also
function." *Id.* at 406-07).
e Katz wrote: "Recent studies demonstrating the significant role of
involuntary and false confessions in wrongful convictions in this
le compelling evidence that our conclusion in *James* as to the admis-
fessions fails to promote just verdicts. Therefore, *stare decisis* should
r decision in this case." *Lawrence*, 282 Conn. at 188. Justice Katz

cross the United States, our legislature is free to
slation requiring police to videotape confessions
it is reasonably feasible to do so. Although valid
ay exist not to impose such a requirement on the
ere can be little doubt that recording confessions
amatically reduce, if not eliminate, any possible
of an erroneous conviction predicated on an invol-
nfession. Indeed, videotaping confessions would
d both the trial court and the jury in evaluating the
ess and, ultimately, the reliability, of those confes-

almer agreed with Justice Katz that "the risk of a
sion is appreciably greater in cases of juveniles and
n mental disabilities."[31] Because such persons are
vulnerable to police overreaching" and may be
y than others to confess falsely" even without
ion, Palmer declared that "videotaping confessions
ons would serve an especially salutary purpose."[32]

. Britton,[33] an *en banc* Supreme Court upheld the
determination that the defendant's statements to
the absence of *Miranda* warnings were admissi-
ecause he was not in custody when he remained
nd state police at the New London police depart-
estioning after he had voluntarily gone there at
of police so that they could take his palm prints.
e Court noted that the defendant contested only
nclusion of the trial court, not the facts found by
rt at the suppression hearing, including that the
eatedly" told the defendant ("suspect") that he
der arrest and was free to leave.[34] In *State v.*
e Supreme Court concluded that the trial court

5.

n. 598 (2007).
3-05. The defendant's argument on appeal was that the "trial court

dmitted into evidence the defendant's inculpatory made in an Arizona jail in the absence of counsel isit from a Connecticut detective and an inspector state's attorney's office after they informed the that the state had obtained a warrant for his arrest r and showed him a copy of the warrant.[36] On e defendant conceded that his federal Sixth nt right to counsel was not triggered by the f the warrant,[37] but argued that his state constitut to counsel had been triggered. The *Stenner* court the defendant's claim, holding that under ut law the right to counsel "is triggered at the same e right to counsel afforded by the sixth amendamely when adversary judicial criminal proceedly begin with the defendant's arraignment in court nformation.[38]

e v. Edman,[39] the Supreme Court affirmed the Court's 2005 decision reversing the defendant's convictions on the grounds that the judge who earch warrant for the defendant's home had a perionship with the defendant that prevented him from he federal and state constitutional requirements that e issued by a neutral and detached magistrate.[40] In *utts*,[41] the Supreme Court held that the trial court denied the defendant's claim that the police acted bly in approaching his already stopped car to conspel an officer's suspicion that the defendant was ile his license was suspended, discerned the smell na, asked for and obtained the defendant's marijua-

758-59.

758 n.19. The defendant's concession regarding any federal constitu- vas necessitated by the Supreme Court's 2006 decision in State v. nn. 42, *cert. denied,* 126 S. Ct. 2873 (2006). The *Stenner* court noted e briefing and analysis using the factors set forth in State v. Geisler, 2. 684-86 (1992), gave the court the opportunity to decide the state

n arrested him.[42] Further, the court rejected the claim that the arresting officer's suppression hearny and representations in an affidavit in support of o search the defendant's apartment after his arrest iently inconsistent so as to require an evidentiary ler the *Franks* exception to the rule that a warrant's o be determined by reviewing the "four corners" of without taking extrinsic evidence.[43] The court also a four corners review and found no error.[44]

v. Davis,[45] the Supreme Court sitting *en banc* y rejected the defendant's claim that the state embraces the "automatic standing rule" that once Fourth Amendment doctrine but was put aside by States Supreme Court in recognition that the doc*mmons v. United States*[46] makes the automatic le unnecessary.[47] For the court Justice Palmer *sler* factorial analysis and concluded that none of *sler* factors favored the defendant's position.[48]

v. Browne,[49] the Appellate Court in a split decision the defendant's motion to suppress should have d because the evidence seized by warrant was not g the items for which the warrant gave authority to majority opinion, written by Judge Berdon, found arity requirement of the Fourth Amendment wartee was violated because the warrant listed cocaine but not marijuana. The supporting application for named only marijuana and the police intended rch for marijuana. The majority declared: "This its face, simply did not describe the property

---

86,690, 692-94.

94-99. *Franks* refers to Franks v. Delaware, 438 U.S. 154 (1978). The ined to revisit its decision in State v. Glenn, 251 Conn. 567 (1999), *Franks* standard as a matter of state constitutional law." *Batts*, 281 .7.

d we hold that it is invalid."[50] The police officer d the warrant application testified that he did so by ısing the "cut and paste" function, taking language ext of a warrant in another case.[51] The majority the particularity requirement applies to the warrant merely the supporting documents.[52] The majority e state's alternate "plain view" argument because were not legally on the premises that they searched, he warrant was not supported by probable cause to cocaine and crack and it did not authorize a search ana. Concluding his energetic dissent,[53] Judge eclared: "To invalidate a warrant premised upon an and affidavit that detailed the possession and sale na by the defendant but, due to typographical error, referenced cocaine is the quintessential exaltation ver substance and is inconsistent with a practical of the particularity clause."[54] The Supreme Court d certification to review.[55]

v. Jenkins,[56] a split panel of the Appellate Court e trial court's denial of a motion to suppress, con- hat the defendant was unlawfully detained, that his search the vehicle was tainted by that illegal deten- at the state failed to purge the taint of the illegal For those reasons, the evidence procured through ant's consent should have been suppressed."[57] As is appellate counsel for the defendant and the case fore the Supreme Court, it is not appropriate to urther on the case.

318.
317 n. 3.
318-19.
321-45.
345.
onn. 903 (2007) ("Whether the Appellate Court correctly determined ourt improperly denied the defendant's motion to suppress evidence t to a search warrant?").

II. TRIAL PRACTICE AND PROCEDURE: PLEA BARGAINING, TRIAL PROOF, JURY INSTRUCTIONS ON OFFENSES AND DEFENSES

preme Court decided two cases of importance he law governing plea bargaining and the enforce- promises leading to bargained-for guilty pleas. ner wrote both decisions. In *State v. Rivers*,[58] the nd the state entered into a written plea and coop- eement under which the defendant promised to to kidnapping in the first degree and to cooperate tate in exchange for sentencing considerations. under the agreement, the defendant gave a taped the police and later testified consistently with that t a probable cause hearing, which resulted in a murder against a co-defendant. At the co-defen- though, on advice of counsel, the defendant Fifth Amendment privilege and refused to testify. eclared the plea and cooperation agreement "null nd charged the defendant with offenses, including der, that would have been barred under the terms of ent. The trial court denied the defendant's motion which asserted that his performance under the barred the state from using his police statement bable cause hearing testimony at trial on the new e trial court also denied a later motion to dismiss ed charges, which again hinged upon whether the ad performed or breached his promises under the The defendant then pleaded nolo contendere to the rder charge, conditional on obtaining appellate he trial court's ruling denying his motion to dis- ording de novo review to the denial of the motion) and regarding the plea agreement as a contract

---

ted all the defendant's state and federal constitutional arguments

ne defendant's waiver of fundamental constitutional
, the Supreme Court noted that the state's "superior
power" means that it bore a special burden of clar-
ng the terms of the agreement:

> , as the drafting party wielding disproportionate
> ust memorialize any and all obligations for which it
> defendant responsible, as well as all promises that
> ade for the purpose of inducing the defendant to
> e. The terms of the agreement should be stated clear-
> nambiguously, so that the defendant, in assenting to
> rtain fundamental rights, knows what is expected of
> what he can expect in return. Likewise, such clarity
> that the state knows what it may demand of the
> t and what it is obligated to provide in exchange for
> dant's cooperation. . . . Indeed, a majority of the fed-
> uit Courts of Appeals follow similar rules, construe
> guity in plea agreements against the government.[61]

preme Court rejected the state's argument that the
reement contained an *implicit* promise to be a
t any trial'" because the written agreement only
the defendant's obligation to be truthful "'in the
defendant] becomes a witness'" and because "we
rue ambiguous language against the state[.]"[62] The
rt reversed the judgment and remanded with an
the defendant's motion to dismiss be granted and
r specific performance of the plea agreement.[63] In
ne court articulated a rule to govern agreements to
Connecticut:

> f the fundamental nature of an obligation to testify in
> xt of a cooperation agreement, we expect and require
> n the government intends for a cooperating defendant
> , it will include such an explicit requirement in the
> nt. [Citation[64]] Unless a plea agreement contains an

---

nclusions and resulting denial of the defendant's motion to dismiss is
g State v. Haight, 279 Conn. 546, 550 (2006)).
ns omitted] *Rivers*, 283 Conn. at 726.

provision requiring that a defendant fulfill a substan-
gation such as testifying, this court will not require the
nt to do so. Likewise, the state may not claim retroac-
at a particular act or omission of a defendant consti-
breach of an agreement when the language of the
nt does not prohibit such an act or omission.[65]

second plea bargaining case, *Orcutt v. Commis-*
ne Supreme Court upheld a habeas court's order of
petitioner who established that he received a sen-
violated his "right to be sentenced in accordance
terms of his plea agreement as mandated by
v. New York, 404 U.S. 257 (1971)."[67] The court
the habeas court had properly held that the peti-
entitled to a sentence that would fulfill "the actual
ne parties to the plea agreement" as to the length of
as actually to serve in prison, as it was a benefit for
defendant had bargained with the state in exchange
lty plea.[68] While recognizing that a criminal defen-
mally expected to raise a *Santobello* claim on direct
by way of a motion to correct an illegal sentence,[69]
ound that the habeas court, in reaching the merits of
had impliedly found that the defendant had not pro-
defaulted; the court also found that the respondent-
failure to seek articulation by the habeas court
he Supreme Court of an adequate record from
conclude otherwise.[70] The *Orcutt* court did agree
espondent, however, that the habeas court should
red that the petitioner be resentenced by the trial
ead of resentencing the petitioner itself.

---

vent of the victim's death, it could have, and should have, said so. It
emotely imply that this was its intent."), *cert. denied*, 216 Conn. 826,
(1990), *cert. denied,* 499 U.S. 922, 111 S. Ct. 1315, 113 L. Ed. 2d 248
s, 283 Conn. at 730.
, 283 Conn. at 729-30.
onn. 724 (2007).

preme Court decided a number of cases that view of constitutional and statutory challenges to ment's burden of proof for particular offenses and stice Katz wrote an important opinion in *State v.* e in which the court analyzed the statute defining angerous felony offender liability as it is affected *di v. New Jersey*,[72] a seminal United States ourt case[73] decided in 2000, which that court has in later cases.[74] Applying *Apprendi*, the *Bell* hat, absent waiver, a defendant has a right to have the sentencing judge, make any findings that are e legislature's prescription of an enhanced penal- sistent dangerous felony offender under General ctions 53a-40(b) and 53a-40(h).[75] Jurisprudence represents our Supreme Court's first major appli-

---

nn. 748 (2007).

. 466 (2000).

l court wrote: "the issue we must determine is whether the trial court ates of *Apprendi v. New Jersey,* 530 U.S. 466 (2000), and its prog- posed the sentence enhancement after its determination 'that [the tory and character and the nature and circumstances of [his] crimi- icate that extended incarceration and lifetime supervision will best interest . . . .' General Statutes § 53a-40 (h)." The *Bell* court set forth olding: "'Other than the fact of a prior conviction, any fact that nalty for a crime beyond the prescribed statutory maximum must be ury, and proved beyond a reasonable doubt. With that exception, we llowing rule] . . . "[I]t is unconstitutional for a legislature to remove e assessment of facts that increase the prescribed range of penalties inal defendant is exposed. It is equally clear that such facts must be roof beyond a reasonable doubt."'" *Bell*, 283 Conn. at 788 (quoting U.S. at 490).

Katz's opinion reviews the major cases that have illuminated the Sixth Amendment jury guarantee in light of *Apprendi. See Bell*, 283 9 (discusses "evolving legal landscape" post-*Apprendi*, including , 536 US. 584 (2002); Blakely v. Washington, 542 U.S. 296 (2004); Booker, 543 U.S. 220 (2005); and Cunningham v. California, 549).

GEN. STAT. § 53a-40(h) provides in pertinent part: "When any person to be a persistent dangerous felony offender, and *the court is of the h person's history and character and the nature and circumstances of*

ne *Apprendi* line of cases.[76] Other *Apprendi* chal- Connecticut practices and procedures[77] can be n cases involving other subsections of the pre-2008 offender statute and other statutes prescribing penalties under prescribed certain conditions.[78] pinion, however, provided a practical primer on gislature may draft statutes constitutionally so as to afoul of *Apprendi* and its progeny.[79]

v. Heinemann,[80] the court rejected the defendant's he was entitled to have his jury instructed to con- age,"specifically, the level of maturity, sense of ity, vulnerability and personality traits of a sixteen when it decided his defense of duress." After ana- e subjective and objective components of t's statutory defense of duress[81] and its Model

---

have been only a few cases so far in which Connecticut courts have e scope of the *Apprendi* ruling. *See, e.g.,* State v. Fagan, 280 Conn. 2006) (*Apprendi* inapplicable, but harmless error even if applicable), 08-25 (Vertefeuille, J., dissenting) (*Apprendi* error); State v. Rizzo, , 229 n.33 (2003); State v. Pierce, 69 Conn. App. 516 (2002) (predi- ffender registration requirement not sentence enhancement finding *endi*), *rev'd on other grds.*, 269 Conn. 442 (2004).

so State v. Myers, 101 Conn. App. 167, *cert. granted,* 283 Conn. 906 *ers*, the Appellate Court found that it was plain error for a trial court epeat drug offender to an enhanced penalty without a guilty plea or t B information against him. *Id.* at 181-86. The case is now on review n the Supreme Court.

GEN. STAT. § 53a-40 (rev. 2007) covered six categories of persistent uthorized enhanced penalties for each, while *mandating* an enhanced r two of the categories. Contrast use of word "shall" in Subsections (h) e of the word "may" in Subsections (j), (k), (l) and (m). All six cate- present *Apprendi* problems, to the extent that each makes a sentenc- *nion* the critical feature that triggers availability of an enhanced sen- the sentence otherwise authorized for the offense for which the defen- nd convicted by a jury. The legislature in a special session in January, the judicial opinion language in the statute that implicated *Apprendi*. pecial Session, Public Act 08-01, section 7 (effective from passage).

ample, the court explained: "§ 53a-40 (h) is unconstitutional, to the oes not provide that a defendant is entitled to have the jury make a ng [that] expose[s] the defendant to a greater punishment than that he jury's guilty verdict . . . .' *Apprendi v. New Jersey, supra,* 530 U.S. ubtedly, if the phrase 'the court is of the opinion that' was excised, §

e genesis, and even while acknowledging that
brain development appears to support differenti-
een the criminal responsibility of adults and young
2 the court declined to "usurp" the legislature's
nority . . . in determining the types and limits of
t for crimes."[83]

ıtial treatment of conduct as a function of the age
status of the persons involved was at the heart of
ederal constitutional issues resolved against the
by an unanimous, *en banc* panel of the Supreme
State v. McKenzie-Adams.[84] The defendant, a
cher, challenged his conviction of thirteen counts
ssault in the second degree for engaging in con-
xual intercourse with two students at his school,
sixteen years of age, normally the age of consent.
he victims' ages and consents did not spare the
criminal liability under General Statutes section
3), which proscribes sexual intercourse between
who] is a school employee and . . . a person who
t enrolled in a school in which the actor works or
nder the jurisdiction of the local or regional board
on which employs the actor . . . " For the court,
rden rejected the defendant's facial and as-applied
to the statute predicated on a claim that he had
to engage in noncommercial consensual sexual
with individuals over the age of consent."[85] The
"We need not decide whether a fundamental right
rivacy exists generally because we agree with the
even if such a right exists, it does not protect sex-

urt wrote: "We acknowledge the defendant's plea, acknowledge that
have more immature decision-making capability and recognize the
orting the notion that juveniles are more vulnerable to all sorts of
ding, but not limited to, duress. The flaw with the defendant's pro-
is that, carried to its logical conclusion, it essentially would require

y in the context of an inherently coercive relation-
as the teacher-student relationship, wherein con-
not easily be refused."[86]

ing that conclusion, the court looked at the princi-
ting two United States Supreme Court's decisions
privacy, first, *Bowers v. Hardwick*[87] in 1986, and,
wrence v. Texas,[88] the 2003 case that overruled
n *McKenzie-Adams*, the court framed the issue
Lawrence to have been "whether freely consenting
e a liberty interest in intimate personal relation-
red in the privacy of their own home."[89] Relying
rence court's distinction between a case involving
engaged in sexual practices "'with full and mutu-
from each other'" and a case involving minors or
ho might be injured or coerced or who are situat-
tionships where consent might not easily be
'[90] the McKenzie-Adams court reasoned that the
s sexual conduct with his students was outside the
otected private conduct recognized in *Lawrence*.[91]
ict scrutiny constitutionally unnecessary, the court
rational basis test and upheld the sexual assault
ed on its rational relation to the government's
interest in promoting a safe school environ-
inally, the court rejected the defendant's separate
hat "the state constitution confers a fundamental
ual privacy on an elementary or secondary school-
engage in consensual sexual intercourse with stu-
the age of consent enrolled in the school system in

98-99.
S. 186 (1986).
S. 558 (2003).
zie-Adams, 281 Conn. at 504, citing *Lawrence v. Texas*, 539 U.S. at 567.
zie-Adams, 281 Conn. at 505-06, quoting *Lawrence v. Texas*, 539

eacher is employed."[93]

zie-Adams was also one of several cases that view of the evidentiary principles governing the ty of uncharged misconduct as proof of a common plan despite the general rule that uncharged mis- inadmissible.[94] Issues concerning the common plan exception arise unidirectionally when the s uncharged misconduct evidence as part of its charged offense. Issues concerning the common plan exception also arise, one might say, recipro- cases, such as *McKenzie-Adams* and *State v.* [95] involving consolidation of cases against a defen- ingle trial. A trial court's decision to consolidate take account whether the evidence against the from one case to the other is "cross admissible."[96] ence is not cross admissible, fair consolidation of nds on whether the trial court can give a caution- tion to the jury adequate to to ensure that the jury

15. The court reached this conclusion by using the factorial analysis te v. Geisler, 222 Conn. 672, 684-86 (1992). Five of the *Geisler* fac- ecedent, textual approach, Connecticut precedent, sister state prece- /sociological considerations) favored the state's position. *McKenzie-* onn. at 510-15. The remaining factor, the historical approach, was ht of the lack of "any relevant evidence of the intent of our constitu- with respect to the right of privacy." *Id.* at 511.

zie-Adams, 281 Conn. at 515-533 (cases brought on behalf of two roperly consolidated where each gave evidence that would be admis- common plan or scheme if tried separately; uncharged misconduct a third person also properly admitted); State v. Jacobson, 283 Conn. 007) (affirmed multiple convictions of sexual assault and risk of d where uncharged misconduct evidence relating to a third young ssible to show common scheme or plan; Appellate Court had previ- nission of the evidence to be error, but not to necessitate new trials); ph, 284 Conn. 328, 334-68 (reversals ordered where, at consolidated es stemming from two discrete robbery scenarios, one including a the trial court erred in authorizing the jury to consider evidence from liberating upon the other).

nn. 328 (2007).

ph, 284 Conn. at 338-39 ("if evidence of a defendant's uncharged ross admissible to establish a common scheme or plan, then separate

se evidence from either case to decide the other.[97]

Borden's opinion for the court in *State v. Randolph* sizes Connecticut evidentiary doctrine governing the ity of uncharged misconduct evidence,[98] then com- painstakingly thorough analysis of the proper use of cheme and plan evidence, with a focus on its use in nvolving sex crimes. This effort is extraordinary, and consistent with Borden's long history of pressing to pon the logic, clarity, and precision with which the governing uncharged misconduct law have been by our reviewing courts.[99] Borden observes that the me charged is a factor that changes the standard "by admissibility of evidence of uncharged is conduct is ."][100] A "liberal standard" applies in cases "when a is charged with a sex crime and evidence of sexual misconduct is offered to establish that the had a common scheme or plan to engage in sex By contrast, a "more stringent standard" applies in t do not involve sex crimes."[102] Borden writes, we have been consistent in our application of this tandard, we have been inconsistent in our articulation nation of the principles that guide our analysis."[103]

---

olph, 284 Conn. at 362-63, 368 (discussing "circumstances in which pable of assessing the merits of each case fairly and independently in ith the trial court's cautionary instructions." *Id.* at 362).

339-41.

xample, in State v. Murrell, 7 Conn. App. 75, 83 (1986), for the rt Judge Borden closely analyzed the functional similarities and legal tween prior misconduct evidence offered to prove identity and such n offered to prove common scheme or plan. *Id.* at 83-84. *See also* State 8 Conn. 85, 132 n.35 (1991) (Borden, J.) (recognizing a "concern" in prejudicial use of common scheme evidence to prove identity). In en wrote that "the common scheme or system of criminal activity oven of several separate but related strands . . . ." *Id.* at 84. The opin- six *different* "strands"with the view that such "categorization" would nize the evidentiary risks which inhere in an otherwise mechanical test ty." *Id.* at 87.

240

en's analysis "reveals the existence of two separate *categories* of cases in which we have applied the heme or plan exception."[104] His *Randolph* opinion explains the two categories, the first called "true" heme or plan cases and the second called "'signa-105

2007 the higher courts reviewed confrontation as requiring more precise delineation of the scope bility of the United States Supreme Court's para-ng decision in *Crawford v. Washington*[106] in *State v. Camacho*,[108] Justice Katz for a unani-eme Court rejected the defendant's federal and ntation challenges to the admission of testimony -conspirator's and dual-inculpatory exceptions to rule.[109] First, the court distinguished between n clause analysis controlled by the *Crawford* test that is "testimonial" and confrontation clause trolled by the pre-*Crawford* test set forth in *Ohio* [10] which gauges the reliability of evidence admit-hearsay exception.[111] Finding that *Roberts* con-he court examined the record and concluded that ged statements were admissible under established hearsay exceptions[113] and were sufficiently to satisfy the confrontation clause.[114]

v. Arroyo,[115] the defendant made confrontation

---

sis added.) *Id.* at 343.
3-57.
. 36 (2004).
year's review, T.H. Everett, *Developments In Connecticut Criminal* ONN. B. J. at 176-82 ("V: The Confrontation Clause After *Crawford:* d Other Cases").
n. 328 (2007).
2 n.21 and 358.
. 56 (1980).
n. at 348, 363-64.
0-51.
7, 362-63.
3-64. The court noted that *constitutional* analysis requires an intrin-

lenges to the admission of videotaped testimony of victim, using *Jarzbek*[116] procedures and the admis- ier testimony under the medical exception to the e and under the constancy of accusation exception say rule.[117] Justice Borden for the court concluded ford did not apply to the videotaped testimony was "the functional equivalent of in-court testimo- court also concluded that the videotaped testimo- duced pursuant to established statutory procedures nsistent with the United States Supreme Court's on holding in *Maryland v. Craig*,[119] which governs stances in which a witness may be examined in the counsel and the court but outside the presence of nt.[120] Employing the "primary purpose test" devel- he United States Supreme Court in *Davis v.* [121] in 2006, the *Arroyo* court also held that state- n by the complainant to a licensed social worker l interviewer while being observed and taped by ement personnel did not constitute "testimonial under *Crawford*: "the primary purpose of the was not to build a case against the defendant, but the victim with assistance in the form of medical health treatment."[123]

r, the Supreme Court in *Arroyo* ordered a new trial sexual assault and risk of injury counts, holding al court had committed reversible error when it defendant's request for a jury charge on his "third ability defense."[124] The court denied the defen- r claims of error, including a claim that the five- ctim's statements given after a formal complaint y been filed were admitted in violation of estab-

---

520-21. *See* State v. Jarzbek, 204 Conn. 683, *cert. denied*, 484 U.S. nd CONN. GEN. STAT. § 54-86g.

tancy of accusation law,[125] and a couple of other
ıs that may command different results if raised in
s on different records.[126]

v. Moore,[127] the Appellate Court found that the
right of confrontation was violated, requiring a
vhere a state's witness who had altered his testi-
bsolved the defendant on cross-examination, then
testimony on redirect before invoking his Fifth
t privilege and refusing any further redirect exam-
preventing recross-examination.[128] The trial court
defendant's motion to strike the redirect testimo-
Appellate Court found that ruling violated the
right of confrontation, which guarantees the right
n new matters raised on redirect.[129] The Appellate
ed harmless error analysis but found that the error
rmless.[130]

36-40. In *State v. Samuels*, 273 Conn. 541 (2005), the court held that
ıde by a victim after he or she had filed an official complaint with the
dmissible as constancy of accusation evidence.'" *Arroyo*, 284 Conn.
ting State v. McKenzie-Adams, 281 Conn. 486, 541 (2007)). In
rt held that the history and purpose of *Samuels* rule "persuade us that
riggered when the declarant is a young child, as in the present case,
cy, rather than the child's parent or guardian, makes an official com-
ice on behalf of the victim." *Id.* at 639.

fendant claimed that the trial court "failed to inform the defendant of
onsular notification under the Vienna Convention of Consular
ıt 601. The Supreme Court declined to address the claim as briefed.
The defendant also claimed that the trial court failed to conduct an
y "into his complaints that he could not communicate adequately
anish-speaking attorney" *Id.* at 640. While the reviewing court found
inquiry to have been adequate, the court makes an interesting point
cord under review: "Although the defendant several times requested
ing attorney, he never claimed that the interpreter services that were
ı were inadequate." *Id.* at 644. Monolingual English-speaking trial
ıdges face a special challenge as guardians of the fair trial rights of
ants who need interpreters because they are competent linguistical-
native language, not English. Attorneys must develop strategies to
' services effectively and to recognize and challenge, where appro-
uacy of interpreters' services that are not effective for a given client.

ases raised "structural" constitutional claims relat-
first principles of criminal procedure. In *State v.*
ustice Palmer for the Supreme Court rejected the
s claim that his constitutional right to be present at
al was violated when he was, *at his own request*,
om the courtroom during his murder trial and again
he was not permitted to return to the courtroom
a violent outburst and other confrontational behav-
marshals holding him outside the courtroom after
oved.[132] Similarly, the court found that, by his con-
efendant had "forfeited" his constitutional right to
imself, which he had requested to do even as he
ng marshals removing him from the courtroom on
e court in response to his own request to leave.[133]

v. Strich,[134] the Appellate Court rejected the defen-
ms that he was "removed from the courtroom in an
nanner" following his disruptive behavior and that
urt misinstructed the jury regarding the defendant's
nd his absence at final arguments.[135] The *Strich*
nd that it was constitutional error not to inform the
that he could "reclaim" his right to be present for
the trial if he gave "proper assurances" of no fur-
tiveness, but the court found that the error impli-
his right to be present guaranteed by Sixth
nt confrontation clause, but "only his generic fifth
t right to participate in the proceedings."[136] That
ot call for automatic reversal,[137] but instead called
ss error analysis.[138] The court concluded that the
armless beyond a reasonable doubt, in part because
ant was given the opportunity to listen to the small

---

onn. 613 (2007).
536-46.
546-50.
n. App. 611, *cert. denied*, 282 Conn. 907, *cert. denied*, 128 S. Ct. 225

of the trial (the prosecutor's closing argument and jury charge) by a closed circuit hook-up.[139]

v. Canales,[140] Justice Norcott for the court reject-ndant's claim that it violates due process of law to preside at a hearing in probable cause resulting er charge where the same judge had previously st and search warrants against her in the case.[141] In *kson*,[142] Justice Katz for the Supreme Court sus-tate's appeal from the Appellate Court which had he trial court's instruction on the reasonable doubt as unconstitutional because its use of the phrase vinced . . . diluted the state's burden of proof from reasonable doubt standard to a clear and convinc-e standard."[143] The court's discussion of different empts to define reasonable doubt, the Federal nter's model instruction, and scholarly studies of convinced" instruction makes for interesting and shows how difficult it is to put an accurate and s on a basic principle of law that is used everyday. lt to explain the meaning of "reasonable doubt" sing into epistemological talk or settling for a tau-a disclaimer — that the reasonable doubt is what its deeper meaning is ineffable. Concluding that e doubt" can be defined, Justice Katz for the court endorses[145] an instruction adopted by the New

---

23.
nn. 572 (2007).
92-600. The court posited that "the question . . . is not whether the ilure to disqualify himself constituted an abuse of discretion, but lure resulted in a violation of the defendant's constitutional right to *Id.* at 593-94. Agreeing that "the statutes and rules of practice evince having a different judge reconsider previously decided questions, or ar to those previously decided[,]" the court declared: "we strongly our trial judges that they disqualify themselves from conducting a hearing when they already have issued arrest or search warrants in *Id.* at 599.
nn. 111 (2007).

reme Court:

> r have held that the concept of reasonable doubt is ble, or that trial courts should not, as a matter of provide a definition. As the foregoing discussion s, there is no mandatory or talismanic phraseology poken will render the instruction constitutionally t. "[E]ven if definitions of reasonable doubt are nec- imperfect, the alternative—refusing to define the at all—is not obviously preferable." *Victor v. a*, 511 U.S. [1,] 26 [(1994)] (Ginsberg, J., concur- herefore, we encourage our trial judges to exercise soned discretion, as did Judge Blue in the present ashion a proper instruction. Reference to the Federal Center's instruction in the present case was appropri- we particularly cite with approval the New Jersey Court's instruction attempting to improve upon that deral charge.[146]

v. Phillips,[147] the Appellate Court reversed the s denial of the defendant's motion for a new trial ded for "a determination on the existing record, of for a new trial, including a finding as to whether acial bias on the part of a juror against the defen- udge DiPentima wrote the unanimous opinion of declaring: "Our task in this case is to strike an delicate balance between preserving the sanctity of deliberative process and ensuring that racial preju- o place in the jury room."[149] The trial court had identiary hearing on the defendant's motion for a t which all six jurors in the case testified concern- bias on the part of a white juror toward the defen- e Appellate Court opinion relates that four of the black, testified that "they believed juror B to be ejudiced against the defendant, who is a black ror B himself "acknowledged the racial overtones

---

n adjudicate its propriety in the context of the case, rather than approve

the jury's deliberations."[152] The trial court "found rors' testimony to be credible" but held that there ence that comments attributed to Juror B "'com- e jury in any way.'"[153] The Appellate Court took the trial court's compliance with the procedural ning the "delicate and complex task of investigat- of juror bias"[154] but took into account that that ality is a core constitutional guarantee and that an f juror misconduct is "all the more grave when s said to be racial bias."[155] The Appellate Court d remanded for a new ruling because the trial ruling employed the wrong legal standard: "It e instead restricted its inquiry to objective evi- cially related statements and behavior. The court have decided whether that evidence amounted to against the defendant on the part of one or more ch would have automatically warranted a new

v. *Fauci*,[157] the Supreme Court broke new ground ly, announcing that the term "prosecutorial " now replaces the traditional term, "prosecutor- duct," as a reviewing court's denomination for trial prosecutor that breach trial rules and imper- dant's right to a fair trial. Justice Zarella opens pinion with a lengthy footnote announcing the nclature, explaining the reasoning behind the and providing an overview of how other jurisdic-

---

21.
22.
25.
23.
25 (citing State v. Santiago, .245 Conn.301, 336 (1998)).
nn. 23 (2007).
ci court makes clear that the change of terms is a formal, not a func- n the law. The new term is "more appropriate" than the old, but the w is for such claims unchanged. *Id.* at 26 n.2. The old term carries

minate such claims.[159] One would expect that all ost obdurate defense appellate counsel will now that allege improprieties instead of acts of mis- hen claiming reversible error based on rule-break- s of trial prosecutors.[160]

POST-CONVICTION PRACTICE AND PROCEDURE.

upreme Court issued three decisions involving correct an illegal sentence under Practice Book -22. In *State v. Lawrence*,[161] the court affirmed a ion of an *en banc* Appellate Court that had upheld ourt's dismissal of a defendant's motion to correct entence. The defendant's claim was that he should convicted of and sentenced for first degree ter instead of first degree manslaughter with a ustice Katz for a unanimous court concluded that vas not one over which a trial court has jurisdiction authority to correct an illegal sentence is limited egories of corrective claims recognized at common *State v. Casiano*,[163] a case before the Supreme a motion to review the trial court's denial of counsel for an appeal from the denial of a motion an illegal sentence, the court held that "an indigent efendant has a right to the appointment of counsel

---

gy better reflects the actions of a prosecutor under *[State v.] Williams* 23 (1987)] because the first part of our analysis looks at whether the prosecutor are improper rather than the effects of those actions on the trial. *Id.*, 540. If these actions do, in fact, so infect the trial with o make the resulting conviction a denial of due process, they rise to rmful impropriety." *Id.* at 26 n.2.

6-28 n.2.

er, the nature of language being what it is, there may come a day in vhen a generation of cases alleging prosecutorial "impropriety" will the benign aspect that term now presents (not yet having been wield- vocates), and when the word "misconduct" will have been rested long lost its current pejorative connotation and to be once again useful

tation in connection with a motion under Practice
n 43-22."[164] The right to counsel is statutory[165]
at the trial level and extends to the appellate level
nitially appointed counsel determines that "the
ho wishes to file such a motion has a sound basis
."[166]

se discussed earlier in this article, *Orcutt v.*
er,[167] the petitioner successfully employed a
a writ of habeas corpus to enforce the terms of a
ent (a "*Santobello* claim"[168]). On appeal the state
the claim should not have been reached by the
t because such claims properly must be brought
on to correct an illegal sentence or on direct
The petitioner had attempted to file a pro se
orrect an illegal sentence, but there was no evi-
t was ever received by the clerk of the court.[170]
Supreme Court affirmed the habeas court's con-
ne merits, it did make clear that it agreed with the
motion to correct an illegal sentence "*is* a proper
a *Santobello* claim"[171] and that failure to pursue
(or an appeal) would be a procedural default bar-
corpus save for the "highly unsual circum-
Orcutt.[172]

v. Commissioner,[173] the hands of time had to be
and the clock rewound in a case reminiscent of
nt time-bending case, *State v. Skakel*.[174] In *Mead*,

7.
GEN. STAT. § 51-296(a).
, 282 Conn. at 627-28.
n. 724 (2007).
tobello v. New York, 404 U.S. 257 (1971).
n. at 737.
2.
sis in original.) *Id.* at 738 n.25.
-0. The court noted that "the factual scenario of this case is highly
" and added that the *Casiano* decision according counsel to an indi-

ner challenged the respondent's calculation of his
o three concurrent sentences of "life" for three acts
egree murder committed on or about August 12,
en the petitioner committed his offenses, "life"
prisonment for the duration of the defendant's nat-
175 The respondent later recalculated petitioner's
based upon a 1980 Public Act regarding indetermi-
nces for "any felony committed prior to July 1,
d the petitioner has since been serving a sentence
-year minimum and with life as its maximum.176
oner earned statutory good time against the mini-
vas now serving, and later was considered for, but
role seven times.177 The trial habeas court denied
n in which he asserted that he was entitled to have
num "life" sentence converted to reflect the current
lefinition of "life" as 60 years.178

oral argument and after receiving supplemental
he effect, if any, of *State v. Skakel*, on the case, the
Court panel hearing *Mead* itself moved for transfer
e to the Supreme Court and the motion was grant-
Supreme Court affirmed the habeas court, con-
at the current statute defining "life" "affects sub-
ghts and, in the absence of any clear and unequivo-
sion by the legislature rebutting the presumption of
e application, that the statute does not apply
ly to persons sentenced prior to its enactment."180
ting dictum at the end of *Mead*, Justice Sullivan
a 1989 Second Circuit decision supports the propo-
the petitioner's sentence should never have been
into an indeterminate sentence at all.181 Because

---

4 (Memorandum of Decision per Karazin, J. (35pp.)). Also, on
2007 Skakel filed a petition for a writ of habeas corpus in the United

ent was presented only in the petitioner's supple-
f "to which the respondent had no opportunity to
and because the petitioner did not claim that he
fer any deleterious effect" by serving the recalcu-
ce, the Mead court left the judgment intact.[183]

IV. Adequacy Of Record

ber of 2007 cases, the Supreme Court faulted the
r failing to provide an adequate record for review.
he court drew an inference in favor of the peti-
llee's position on procedural default even though
court decision under review only implicitly had
petitioner.[184] Ambiguity in the habeas decision
d against the respondent-appellee: "Having failed
rticulation by the habeas court on the issue of pro-
ault, the respondent cannot now complain that the
not contain an express finding by the habeas
hat issue."[185] In *Dickinson v. Mullaney*, the
ourt reversed the Appellate Court, concluding that
properly reached the merits of the petitioner's
ppeal because the habeas court record is inade-
ermit any meaningful review of the petitioner's
he habeas court had not made the requisite find-
cusable delay [when the habeas court found the
arred by laches]."[186] The court called the lack of
inexcusable delay an "overlooked matter" in the
t's memorandum of decision and concluded that
er-appellant had failed to make the record ade-
view by filing a motion of articulation.[187]

y, in *State v. Dalzell*,[188] the Supreme Court
e Appellate Court for reaching out to decide a

27.

l seizure case on legal grounds that "never had been gued or briefed by the parties before that court."[189] eme Court also rejected the defendant's alternate r affirmance based on a pretextual stop argument ıot raised in the trial court and for which the trial made no findings, leaving the record inadequate for der *State v. Golding*.[190]

seeking remands for further development of the cord do not fare well. In affirming the Appellate rder that the defendant's motion to suppress be ne Supreme Court in *State v. Edman*,[191] found that vas not entitled to a remand to the trial court for a ıtiary hearing to augment the record, having at the previously "relinquished the opportunity for an evi- hearing."[192] In *Taylor v. Commissioner*,[193] the Court held that there was no need for the Appellate ıave ordered a remand for the habeas court make ndings on procedural default (for which the respon- istently pleaded and argued throughout the case), tead to dispose of the case more efficiently in the t's favor on other grounds.[194]

e v. Fabricatore,[195] the Supreme Court found that showed that the defendant at trial had "expressly

---

715.

717-22 (discussing doctrinal tension in use of State v. Golding, 213 9-40 (1989), to review unpreserved search and seizure claims, recent- in State v. Brunetti, 279 Conn. 39, 55-56 (2006), *cert. denied,* 127 S. 7)).

Conn. 444 (2007).

465. The court had first explained: "Like the Appellate Court, we ord the state a second opportunity to contest the defendant's affidavit his motion to suppress, *which the trial court accepted as true and on l court's legal determinations were premised,* given the absence of any- ecord to demonstrate that the state did not acquiesce to the truth the ." (Emphasis added.) *Id.*

his appellate right to challenge a jury charge on retreat where trial counsel "clearly expressed his with that instruction" and "openly acquiesced at he retreat theory upon which the case was tried.[197]